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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
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December 21, 1992

To: Jim Pharris, Office of the Attorney General

From: Gerald Lenssen GL, Supervisor, Hazardous Waste Permit Section

Through: Tom Eaton TE, Program Manager, Solid and Hazardous Waste Program

Subject: Concurrence with the Definition of "Facility" for the Purpose of Demonstrating Compliance with the Dangerous Waste Siting Criteria.

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The purpose of this memo is to inform you of the definition of "facility" we are using for the proposed ESC incinerator project. This definition is a critical issue in our tentative decision that ESC meets the siting criteria requirements in WAC 173-303-282. Our decision is likely to be appealed. We are requesting that you review our analysis and inform us if you cannot agree that our decision has a firm legal basis.

Ecology must respond to the siting criteria demonstration by February 5, 1993. (WAC 173-303-282(4)(c) requires the department to respond within 60 days of receipt of a demonstration of compliance.) Therefore, we must receive an early response to this memo. Additionally, we expect the public to have questions on Ecology's interpretation before February 5th, so an early response from you would be very helpful in responding to their questions.

The remainder of this memo outlines the issue and the basis for our tentative decision.

BACKGROUND ON THE PROJECT

ESC first proposed to manage dangerous waste at the Grant County site in 1982. A dangerous waste incinerator was first proposed at the location in 1986. (See Attachment 1 for a more complete history of the proposed project.)

Ecology promulgated siting criteria for dangerous waste management facilities in October 1990. All proposed facilities, and existing facilities proposing a significant expansion of their operations, were required to submit a demonstration of compliance with siting criteria under WAC 173-303-282(2). ESC's first Siting Criteria Demonstration was submitted in January 1991.

Ecology made a tentative decision that ESC passed the siting criteria in May of 1991. The public brought up significant issues surrounding depth to ground water and archaeological sites during the comment period on that tentative decision. As a result, Ecology required additional information from ESC. Based on the additional information submitted by ESC, Ecology again made a tentative determination that ESC met the siting criteria. The second tentative decision was made in July of 1992. After conducting public hearings, but before the decision was made final, Ecology became aware that ESC was planning to change the location of their proposed dangerous waste management unit boundary. As a result, Ecology required ESC to resubmit their siting criteria demonstration. The current demonstration is dated December 4, 1992 and was received by Ecology on December 7th.

CURRENT SITUATION

During the development of the current siting criteria demonstration, ESC discovered an archaeological site on their property (see Attachment 2). The State Office of Archaeological and Historic Preservation confirmed that the newly discovered site was registered December 11, 1992. Our determination whether this archaeological site causes ESC to fail compliance with the siting criteria (see WAC 173-303-282(7)(e))depends on how we define "facility" for purposes of the siting criteria demonstration.

STATE AND FEDERAL DEFINITIONS OF "FACILITY"

"Facility" is defined at WAC 173-303-040. The State definition is similar to the federal definition presented in 40 CFR Subpart 260.10. However, it should be noted that EPA has two definitions for "facility" under RCRA. The definition referenced above is used by EPA to implement RCRA Subtitle C requirements with the exception of the proposed Subpart S corrective action requirements. A second, broader definition of "facility" is used for corrective action (see Attachment 3 for these definitions). Attachment 4 contains excerpts of Federal Registers from 1982 and 1985 discussing "facility". It seems as though the way "facility" is described in these early Federal Registers is the way it is now being used for corrective action. "Facility" does not seem to be interpreted in this way for other aspects of the RCRA program uniformly. (For example, consider the major aluminum smelters and oil refineries which cover large areas under one ownership, and where the "dangerous waste facilities" are defined as a relatively confined area.)

The second, broader definition of "facility" has been upheld by the courts, and EPA intends to continue to use it for corrective action. EPA also intends to ensure any authorized corrective action program in this State would have a comparable definition of "facility" for corrective action. Therefore, the way "facility"

Contiguous land owned by the proponent is limited in the case of ESC, and it would have been reasonable to include it as the "facility". However, the minimum size possible for a "facility" (i.e., the dangerous waste management boundary surrounded by a 200 foot buffer) was defined in correspondence with the public and proponent. (Note, although both ECOS and Chem Waste defined "facility" as less than all contiguous land under the same ownership, neither defined the minimum size "facility" for their demonstration (see Attachment 5)). At the time "facility" was defined for ESC it had no apparent impact on whether the company would pass or fail the siting criteria. Now, because of the newly discovered archaeological site within the property boundary, it does, and we expect local opponents of the project and environmental groups to challenge our previous definition. Conversely, if we were to consider the property line as the "facility" boundary, ESC would fail the siting criteria requirements; this definition of "facility" would be counter to previous statements made by Ecology, and ESC would almost certainly appeal.

I appreciate your attention to this issue. I would appreciate being informed of the name of the attorney assigned to respond. My telephone number is 438-7412. If you would like to arrange a meeting to discuss these issues, contact me or Martin Werner at 438-7411.

Attachments

is defined for siting criteria should not affect the potential scope of any future corrective action under RCRA, or a state authorized corrective action program, for the project. However, the way "facility" is defined now will determine where dangerous waste management activities could occur and the area regulated under the operating permit.

"FACILITY" FOR SITING CRITERIA

Environmental factors under the rule for siting criteria have "exclusion zones" or "set backs" for either "facility" or "dangerous waste management unit" (DWMU) boundaries. For example, "facilities" are excluded from designated archaeological sites (see WAC 173-303-282(7)(e)).

We have designated the area Ecology considered as "facility" for the ESC project in previous letters to the public and the project proponent (see Attachment 5). "Facility" for ESC was defined by the boundary of the dangerous waste management units, plus a 200 foot setback. Under the siting criteria, this is the minimum size for a nonland-based "facility" (see WAC 173-303-282(7)(a)(i)). Jerry Ackerman reviewed and discussed this definition of the ES "facility" so he is familiar with our rationale.

Note, that the ESC "facility", as we have defined it, does not include all of the contiguous property owned by ESC (see Attachment 5). This is consistent with other projects, where it would have been unreasonable to define "facility" as the entire property owned by the project proponent. For example, ECOS proposed a dangerous waste facility covering approximately 700 acres within 4,500 acres of contiguous land under ECOS's ownership. The land not included in the 700 acre facility was to be maintained as agricultural land and would not have been used to manage dangerous wastes. It would have been unreasonable to consider the entire property as the "facility," and Ecology accepted the boundaries defined by ECOS for its siting criteria demonstration.

Likewise, Chem Waste proposed a dangerous waste incinerator facility on the Hanford Reservation. The broadest definition of the "facility" could have included all of the Department of Energy property on Hanford. Neither the ECOS nor Chem Waste projects could have met the siting criteria requirements if the "facility" included all contiguous land under one ownership. Dangerous waste facilities on port, or other public agency, property are other examples where including all contiguous land under one ownership as the "facility" could lead to unreasonable implementation of the siting criteria requirements.

I. SIGNIFICANT QUESTIONS AND RESOLVED ISSUES—DECEMBER 1989

A. RCRA

1. Manifesting Requirements and EPA ID Numbers

Two facilities, one a nuclear power plant and the other a conventional coal burning power plant, are owned by the same company and occupy adjacent tracts of land divided by a river. The company owns a dam on the river that connects the two tracts passage from one facility to the other. For safety reasons, the dam is not utilized for the transport of hazardous waste between the facilities. A public highway forms the boundary of the properties along one edge. Transport of hazardous waste between the facilities occurs via this public highway. The two facilities currently share one EPA identification number. Can the two facilities continue to share one identification number or must each have its own number? Is a manifest required to transport hazardous waste between the facilities?

Each of the facilities will be required to obtain its own EPA identification number. Due to the safety hazard associated with using the dam to move wastes from one facility to the other, no effective connecting right-of-way exists between the two facilities, and they are considered to be two individual sites. Hazardous wastes transported along the public highway from one site to the other must be accompanied by a manifest in accordance with 40 CFR 262.20, which states that a generator who transports, or offers for transportation, hazardous waste for off-site treatment, storage, or disposal must prepare a manifest.

Source: Emily Roth, OSW (202) 382-4777
Research: Jenny Peters

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later date. This will also hold for cleanup actions reviewed by the Agency that are not subject to permit modifications. It is not possible for the Agency to delegate to owner/operators the ultimate responsibility for ensuring that remedial activities fully satisfy RCRA's statutory requirement for protection of human health and the environment.

The Agency solicits comments on the approach to voluntary corrective action described above.

B. Definitions (Section 264.501)

EPA is today proposing to define five key terms which apply specifically to this subpart.

1. *Facility.* In the July 15, 1985, Codification Rule, EPA interpreted the term "facility" in the context of section 3004(u) to mean all contiguous property under the control of the owner/operator of a facility seeking a permit under subtitle C. This interpretation was upheld in a decision of the U.S. District Court of Appeals (*United Technologies Corporation* vs. *U.S. EPA*, 821 F2d. 714 (DC Cir. 1987)). Thus, by proposing this interpretation as the definition of facility in today's rule, EPA is not modifying its basic interpretation as previously elaborated for the purpose of implementing section 3004(u). There are, however, several aspects of this definition which merit further clarification.

The definition of facility in today's proposal at § 264.501 is not intended to alter or subsume the existing—and narrower—definition of "facility" that is given in 40 CFR 260.10. That definition describes the facility as "* * * all contiguous land and structures * * * used for treating, storing or disposing of hazardous waste * * *" EPA intends to retain this definition for the purposes of implementing RCRA subtitle C requirements, with the exception of subpart S corrective action (including those provisions governing corrective action for regulated units). At the same time, however, the Agency is reviewing its uses of the term "facility" in other parts of the subtitle C regulations to ensure consistent usage.

Today's proposed definition refers to "contiguous property" under the control of the owner/operator. Several questions have been raised as to the Agency's interpretation of "contiguous property" in the context of defining the areal limits of the facility. Clearly, property that is owned by the owner/operator that is located apart from the facility (*i.e.*, is separated by land owned by others) is not part of the "facility." EPA does intend, however, to consider property that is separated only by a public right-of-way (such as a roadway or a power transmission right-of-way) to be contiguous property. The term "contiguous property" also has significant additional meaning when applied to a facility where the owner is a different entity from the operator. For example, if a 100-acre parcel of land were owned by a company that leases five acres of it to another company that, in turn, engages in hazardous waste management on the five acres leased, the "facility" for the purposes of corrective action would be the entire 100-acre parcel. Likewise, if (in the same example) the operator also owned 20 acres of land located contiguous to the 100-acre parcel, but not contiguous to the five-acre parcel, the facility would be the combined 120 acres. EPA invites comment on these interpretations of contiguous property.

In some cases, adjacent properties may be separately owned by two different subsidiaries of a parent company, where only one of the subsidiaries' operations involves management of hazardous wastes. In such cases, EPA intends to consider the ownership to be held by the parent corporation. Thus, in the example provided, the facility would include both properties.

EPA acknowledges that, in some situations, "ownership" of property can involve a complex legal determination. EPA solicits comment and information on the interpretation offered in general, and specifically on the issue of how ownership or "control" of property should be determined in the context of subsidiary-parent companies.

2. *Release.* Today's proposal includes the definition of "release" articulated in the preamble to the July 15, 1985, Codification Rule. This definition essentially repeats the CERCLA definition of release. Today's proposed definition also includes language from SARA which extended the concept of "release" to include abandoned or discarded barrels, containers, and other closed receptacles containing hazardous wastes or hazardous constituents.

Although this definition of release is quite broad, section 3004(u) is limited to addressing releases from solid waste management units. Thus, there may be releases at a facility that are not associated with solid waste management units, and that are therefore not subject to corrective action under this authority. (See discussion below which defines solid waste management unit.)

Many facilities have releases from solid waste management units that are issued permits under other environmental laws. For example, stack emissions from a solid waste refuse incinerator at a RCRA facility are likely to be authorized under a State-issued air permit. Another example would be NPDES (National Pollutant Discharge Elimination System, under the Clean Water Act), or State-equivalent, permits for discharges to surface water from an industrial wastewater treatment system. EPA does not intend to utilize the section 3004(u) corrective action authority to supersede or routinely reevaluate such permitted releases. However, in the course of investigating RCRA facilities for corrective action purposes, EPA may find situations where permitted releases from SWMUs have created threats to human health and the environment. In such a case, EPA would refer the information to the relevant permitting authority or program office for action. If the permitting authority is unable to compel corrective action for the release, EPA will take necessary action under section 3004(u) (for facilities with RCRA permits) or section 3008(h) (for interim status facilities), as appropriate, and to the extent not inconsistent with certain applicable laws (see section 1006(a) of RCRA).

3. *Solid Waste Management Unit (SWMU).* Today's rule proposes the following definition of solid waste management unit:

> Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released.

This definition is also derived from the Agency interpretation discussed in the July 15, 1985, Codification Rule. A discernible unit in this context includes the types of units typically identified with the RCRA regulatory program, including landfills, surface impoundments, land treatment units, waste piles, tanks, container storage areas incinerators, injection wells, wastewater treatment units, waste recycling units, and other physical, chemical or biological treatment units.

The proposed definition also includes as a type of solid waste management unit those areas of a facility at which solid wastes have been released in a routine and systematic manner. One example of such a unit would be a wood preservative "kickback drippage" area, where pressure treated wood is stored in a manner which allows preservative fluids routinely to drip onto the soil, eventually creating an area of highly contaminated soils. Another example might be a loading/unloading area at a

facility, where coupling and decoupling operations, or other practices result in a relatively small but steady amount of spillage or drippage, that, over time, results in highly contaminated soils. Similarly, if an outdoor area of a facility were used for solvent washing of large parts, with amounts of solvent continually dripping onto the soils, that area could also be considered a solid waste management unit.

For clarification purposes it may also be useful to identify certain types of releases that the Agency does not propose to consider solid waste management units using the "routine and systematic" criterion. A one-time spill of hazardous wastes (such as from a vehicle travelling across the facility) would not be considered a solid waste management unit. If the spill were not cleaned up, however, such a spill would be illegal disposal, and therefore subject to enforcement action under section 3008(a) or section 7003 of RCRA. Similarly, leakage from a chemical product storage tank would generally not constitute a solid waste management unit; such "passive" leakage would not constitute a routine and systematic release since it is not the result of a systematic human activity. Likewise, releases from production processes, and contamination resulting from such releases, will generally not be considered solid waste management units, unless the Agency finds that the releases have been routine and systematic in nature. (Such releases could, however, be addressed as illegal disposal under section 3008(a) or section 7003.) EPA solicits comment on these interpretations, and on the overall definition of solid waste management unit.

EPA recognizes that these interpretations have the effect of precluding section 3004(u) from addressing some environmental problems at RCRA facilities. However, EPA intends to exercise its authority, as necessary, under the RCRA "omnibus" provision (section 3005(c)(2)), or other authorities provided in RCRA (*e.g.*, section 3008(a) and section 7003) or CERCLA (*e.g.*, CERCLA section 104 or section 106), or States, under State authorities, to correct such problems and to protect human health and the environment.

The RCRA program has identified certain specific units and waste management practices at facilities about which questions have been raised concerning applicability of the definition of a solid waste management unit. One such question relates to military firing ranges and impact areas. Such areas are often potentially hazardous, due to the presence of unexploded ordnance. EPA has decided that such areas should not be considered solid waste management units. There is a strong argument that unexploded ordnance fired during target practice is not discarded material which falls within the regulatory definition of "solid waste." Ordnance that does not explode, as well as fragments of exploded ordinance, would be expected to land on the ground. Hence, the "ordinary use" of ordnance includes placement on land. Moreover, it is possible that the user has not abandoned or discarded the ordnance, but rather intends to reuse or recycle them at some time in the future. In addition, a U.S. District Court decision (*Barcello* vs. *Brown*, 478 F. Supp. 646, 668–669 (D. Puerto Rico 1979)), has suggested that materials resulting from uniquely military activities engaged in by no other parties fall outside the definition of solid waste, and thus would not be subject to section 3004(u) corrective action.

Another issue which raises questions regarding the definition of "solid waste management unit" relates to industrial process collection sewers. Process collection sewers are typically designed and operated as a system of piping into which wastes are introduced, and which usually discharge into a wastewater treatment system. The Agency believes that there are sound reasons for considering process collection sewers to be solid waste management units. Such sewers typically handle large volumes of waste on a more or less continuous basis, and are an integral component of many facilities' overall waste management system. Program experience has further indicated that many of these systems, especially those at older facilities, have significant leakage, and can be a principal source of soil and ground-water contamination at the facility. Although process collection sewers are physically somewhat unique in the context of the types of units which have traditionally been regulated under RCRA, EPA believes that including them as solid waste management units for purposes of corrective action is well within the discretion provided under the statute for EPA to determine what "units" should be subject to RCRA standards.

EPA recognizes that there may be technical problems associated with investigating releases from process collection sewers, and with correcting leakage. Information and comment are specifically solicited on EPA's tentative decision to treat process collection sewers as solid waste management units, and on technical approaches and limitations to investigating and correcting releases from such systems.

For essentially the same reasons as described above for process sewers, EPA also proposes to include open (or closed) ditches that are used to convey solid wastes as solid waste management units; comment is also solicited on this interpretation.

4. *Hazardous Waste and Hazardous Constituents.* Section 3004(u) requires corrective action for releases of "hazardous wastes or constituents." The Agency believes that use of the term "hazardous waste" denotes "hazardous waste" as defined in section 1004(5) of RCRA. Accordingly, today's proposed rule repeats the statutory definition of "hazardous waste" found in that section. The term "hazardous waste" is distinguished from the phrase "hazardous waste listed and identified," which is used elsewhere in the statute to denote that subset of hazardous wastes specifically listed and identified by the Agency pursuant to section 3001 of RCRA. Thus, the remedial authority under section 3004(u) is not limited to releases of wastes specifically listed in 40 CFR part 261 or identified pursuant to the characteristic tests found in that section. Rather, it extends potentially to any substance meeting the statutory definition. However, EPA believes that use of the phrase "hazardous wastes or *constituents*" (emphasis added) indicates that Congress was particularly concerned that the Agency use the section 3004(u) authority to address a specific subset of this broad category, that is, hazardous constituents.

The term "hazardous constituent" used in section 3004(u) means those constituents found in appendix VIII to 40 CFR part 261. See H. Rep. No. 98–198, 98th Cong., 1st Sess. 60–61, May 17, 1983. In addition, the Agency proposes to include within the definition those constituents identified in appendix IX to 40 CFR part 264. Appendix IX generally constitutes a subset of appendix VIII constituents particularly suitable for ground-water analyses. However, it also includes additional constituents not found on appendix VIII, but commonly addressed in ground-water analysis conducted as a part of Superfund cleanups.

It is EPA's intention that investigations of releases under subpart S focus on the subset of hazardous waste (including hazardous constituents) that is likely to have been released at a particular site, based on the available information. Only where very little is known of waste characteristics, and where there is a

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rts that the Hospital's ct provides the principal issuance of a bargain- and Order at 3–4. We wever, that the Board e validity of the Hospifaith doubt based upon Moreover, even if it is spital had no basis for ubt, the Board cannot fact of the Hospital's 5) violations for support er.

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der, to the exclusion of a rerun election, those cases do not represent application of a per se remedial rule.... [T]he Board must assess the question of appropriate remedy on a case-by-case basis.

Id. at 617, 89 S.Ct. at 1942. The Board found, in that case, that the benefits granted were not so substantial that their effects could not be erased by traditional remedies. *Id.* Such an analysis is lacking here.

In *Uniontown Hosp.*, 277 N.L.R.B. 1298 (1985), the Board refused to issue a bargaining order in a case where the employer committed numerous unfair labor practices including maintenance of an overly broad no solicitation rule, threats to discipline employees for solicitation, physical interference with leafletting, more than a dozen coercive interrogations, and threats to discharge union supporters in front of groups of employees. The Board concluded that these actions were "not the type of conduct that would linger in the minds of employees and preclude a free and uncoerced vote in the future." *Id.* at 1300. Particularly in light of our analysis of the ALJ's individual unfair labor practice findings, the Hospital's conduct would seem less egregious than that of the employer in *Uniontown Hospital. See also NLRB v. Village IX. Inc.*, 723 F.2d 1360, 1370–72 (7th Cir.1983) (numerous unfair labor practices including firing an employee would not have had a lasting impact if a rerun election were held); *Century Moving*, 683 F.2d at 1094 (bargaining order not enforced because there was no history of anti-union animus or prior violations even though employer had committed several severe violations); *American Spring Bed*, 670 F.2d at 1247–48 (violations did not intimidate or coerce employees' free choice).

All of these cases reflect the careful assessment of relevant factors that *Peoples Gas* requires and that we have found lacking here. The Board must explicitly determine whether traditional remedies can erase the effects of the unfair labor practices and ensure a fair rerun election. If so, a bargaining order is not justified. Therefore, we remand this question to the Board for reassessment. If the Board still concludes that a bargaining order is necessary, it must adhere to our *Peoples Gas* requirement that it explain why.

III. Conclusion

We find that substantial evidence supports some of the ALJ's findings of unfair labor practices, but not others. As the findings of post-election violations were predicated on a flawed analysis of the Hospital's assertion of a good faith doubt as to the Union's majority status, these must be reviewed on remand, as must the propriety of the Board's bargaining order. Accordingly, we enforce the Board's order in part, grant the petition for review in part, vacate the bargaining order, and remand to the Board for proceedings consistent with this opinion.

It is so ordered.

MOBIL OIL CORPORATION, Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, Respondent,

Hazardous Waste Treatment Council, Chemical Waste Management, Inc., Chemical Manufacturers Association and American Iron & Steel Institute, Intervenors.

No. 88–1788.

United States Court of Appeals, District of Columbia Circuit.

April 4, 1989.

Oil company challenged the Environmental Protection Agency's (EPA) new interpretation of the Resource Conservation and Recovery Act section governing national capacity variance waste, under which

land disposal of national capacity variance waste is permitted only if individual landfill or surface impoundment satisfies the requirements of double lining, leachate collection, and groundwater monitoring. The Court of Appeals held that the EPA's new interpretation was a reasonable exercise of EPA's discretion.

Review denied.

1. Statutes ⇐219(3)

Although consistency of agency's interpretation of statutory language is one relevant factor in judging its reasonableness, agency's reinterpretation of language is nevertheless entitled to deference, so long as agency acknowledges and explains departure from its prior views.

2. Health and Environment ⇐25.5(5.5)

For purposes of statute which requires that national capacity variance wastes be disposed of in "facility" which meets certain technological requirements, EPA's conclusion that "facility" involved was individual unit rather than waste management complex as whole, was reasonable, even though EPA, in construing other portions of statute, had not always read "facility" to refer to individual units; EPA was entitled to construe term to mean different things in different contexts to best serve legislative purposes. Resource Conservation and Recovery Act of 1976, § 3004(h)(4), as amended, 42 U.S.C.A. § 6924(h)(4).

See publication Words and Phrases for other judicial constructions and definitions.

3. Health and Environment ⇐25.5(5.5)

EPA's new interpretation of Resource Conservation and Recovery Act section governing national capacity variance wastes, whereby land disposal of national capacity variance waste is permitted only if individual landfill or surface impoundment satisfies requirements of double lining, leachate collection, and groundwater monitoring, represented reasonable exercise of EPA's discretion. Resource Conservation and Recovery Act of 1976, § 3004(h)(4), as amended, 42 U.S.C.A. § 6924(h)(4).

Petition for Review of an Order of the Environmental Protection Agency.

Karl S. Bourdeau and Harold Himmelman, Washington, D.C., were on the brief, for petitioner.

Daniel S. Goodman, Atty. Dept. of Justice, Donald A. Carr, Acting Asst. Atty. Gen., Dept. of Justice, and Steven E. Silverman, Atty., U.S.E.P.A., Washington, D.C., were on the brief, for respondent.

Roger J. Marzulla, Atty. Dept. of Justice, and Lawrence J. Jensen, Atty., U.S.E.P.A., Washington, D.C., also entered appearances for respondent.

David R. Case and Angus Macbeth, Washington, D.C., were on the joint brief, for intervenors Hazardous Waste Treatment Council and Chemical Waste Management, Inc.

John T. Smith II and David F. Zoll, Washington, D.C., were on the brief, for intervenor Chemical Mfr's Ass'n.

Steven F. Hirsch, Gary H. Baise and Barton C. Green, Washington, D.C., entered appearances, for intervenor American Iron & Steel Institute.

Before WALD, Chief Judge, and EDWARDS and RUTH BADER GINSBURG, Circuit Judges.

Opinion Per Curiam.

PER CURIAM:

Petitioner Mobil Oil Corporation ("Mobil") challenges the Environmental Protection Agency's ("EPA") new interpretation of § 3004(h)(4) of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. § 6924(h)(4). We conclude that the EPA's interpretation of this statutory provision represents a reasonable exercise of the agency's discretion. The petition for review is accordingly denied.[1]

I. Facts

Pursuant to its statutory mandate, the EPA recently established land disposal re-

1. Our holding is consistent with a prior panel's decision in Steel Bar Mills Association v. EPA, No. 88-1608 (judgment order filed February 22, 1989). However, since *Steel Bar Mills* was decided in an unpublished order, and since Mobil was not a party to that dispute, we are not

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an, Atty. Dept. of Jus-
rr, Acting Asst. Atty.
e, and Steven E. Silver-
P.A., Washington, D.C.,
for respondent.

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FACTS

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strictions for a number of hazardous wastes. *See* 53 Fed.Reg. 31,137 (August 17, 1988).[2] These wastes are prohibited from land disposal unless they have been treated so as to meet standards set by the regulations. In some cases, however, the agency recognized that, due to a lack of available treatment facilities, it is not feasible to require immediately that particular wastes be treated to the applicable standard. For these wastes, the EPA established a two-year "national capacity variance."[3] The statute provides that national capacity variance wastes "may be disposed of in a landfill or surface impoundment only if such facility is in compliance with the requirements of subsection (*o*) of this section." RCRA § 3004(h)(4), 42 U.S.C. § 6924(h)(4). Subsection (*o*), 42 U.S.C. § 6924(*o*), imposes certain "[m]inimum technological requirements": double liners, a leachate[4] collection system, and groundwater monitoring.

The dispute between the parties here centers on the statutory requirement that national capacity variance wastes be disposed in a "facility" which meets the technological requirements established by subsection (*o*). These technological standards apply (for purposes relevant here) only to landfills or surface impoundments placed in operation after November 8, 1984. Subsection (*o*) does not prohibit the land disposal of hazardous waste in older units which do not meet the technological requirements. Under the EPA's original interpretation of § 3004(h)(4), national capacity variance wastes could be land disposed in these other units, so long as any new units at the same waste management complex met the § 3004(*o*) standards, since the "facility" (meaning the management complex as a whole) would satisfy the § 3004(*o*) requirements. *See* 51 Fed.Reg. 40,603–40,604 (November 7, 1986).

The August 1988 rulemaking, however, announced that

> EPA has reevaluated its original interpretation and now believes that Congress intended the term "facility" to refer to "unit," which is consistent with the Agency's current interpretation of the term "facility" in RCRA section 3004(g)(6), referring to the disposal of First Third wastes for which no treatment standards have been established.

53 Fed.Reg. 31,186 (August 17, 1988). Under this new interpretation, land disposal of national capacity variance wastes is permitted only if the individual landfill or surface impoundment satisfies the 3004(*o*) requirements of double lining, leachate collection, and groundwater monitoring. Mobil contends that this is an impermissible construction of the statutory language.

II. ANALYSIS

A. *Scope of Review*

Our analysis is guided by the Supreme Court's decision in *Chevron U.S.A. v. Nat-*

bound by the earlier decision. *See National Classification Committee v. United States*, 765 F.2d 164, 170 (D.C.Cir.1985) (under this circuit's rules, an unpublished opinion is binding upon the parties if the issue is relitigated, but "has no precedential effect with respect to other parties").

2. The RCRA was enacted in 1976 and substantially amended in 1984. The Hazardous Solid Waste Amendments of 1984 required the EPA to establish a schedule dividing hazardous wastes into "thirds," *see* 42 U.S.C. § 6924(g)(4); the agency promulgated the schedule in May of 1986. *See* 51 Fed.Reg. 19,300 (May 28, 1986). The August 1988 rulemaking established treatment standards for "first-third" scheduled wastes. For a fuller discussion, *see generally Chemical Waste Management v. EPA*, 869 F.2d 1526, 1529–30 *slip op.* at 7–8 (D.C.Cir.1989).

3. The agency's authority to establish a national capacity variance is derived from RCRA § 3004(h)(2), 42 U.S.C. § 6924(h)(2), which provides that "[t]he Administrator may establish an effective date different from the effective date which would otherwise apply.... Any such other effective date shall be established on the basis of the earliest date on which adequate alternative treatment, recovery, or disposal capacity which protects human health and the environment will be available. Any such other effective date shall in no event be later than 2 years after the effective date of the prohibition which would otherwise apply...."

4. Leachate is produced when liquids, such as rainwater, percolate through wastes stored in a landfill or surface impoundment. If the wastes are stored in lined containers, the leachate can be removed and treated before it seeps into soil or groundwater.

ural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842–43, 104 S.Ct. at 2781–82 (citations omitted). In the present case, we do not believe that the statutory language is unambiguous. The RCRA does not provide a definition of the term "facility." Nor does the legislative history offer a clear and unequivocal resolution of this question. We therefore must determine whether the agency has arrived at a "permissible"—*i.e.*, reasonable—interpretation of the Act.

[1] Mobil relies heavily on the Supreme Court's recent pronouncement that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987) (citing *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 1681, 68 L.Ed.2d 80 (1981)). Of course, since *Chevron* itself involved an agency shift in policy, that case could hardly be inapposite simply because the EPA has reconsidered its earlier views. Although the consistency of an agency's interpretation is *one* relevant factor in judging its reasonableness, *see NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 108 S.Ct. 413, 421 n. 20, 98 L.Ed.2d 429 (1987), an agency's reinterpretation of statutory language is nevertheless entitled to deference, so long as the agency acknowledges and explains the departure from its prior views.[5]

B. *The Statutory Language*

[2] The word "facility" is not defined by the statute and appears to be a generic term rather than a term of art. Given the EPA's superior competence in technical matters, the agency should have broad discretion to give content to this language. *See MCI Cellular Telephone Company v. FCC*, 738 F.2d 1322, 1333 (D.C.Cir.1984) (on "a highly technical question ... courts necessarily must show considerable deference to an agency's expertise"). The EPA's construction of the statutory term is reinforced by the context in which that term appears. The provision at issue here states that national capacity variance wastes "may be disposed of in a landfill or surface impoundment only if *such facility* is in compliance with the requirements of subsection (*o*)." RCRA § 3004(h)(4), 42 U.S.C. § 6924(h)(4) (emphasis supplied). The phrase "such facility" appears to refer back to "landfill or surface impoundment." This supports the agency's conclusion that the "facility" involved is the individual unit rather than the waste management complex as a whole.

The petitioner emphasizes that the agency, in construing other portions of the statute, has not always read the word "facility" to refer to the individual unit. The EPA acknowledges this fact but argues that

> [t]he statutory definitions in which the word is used suggest that "facility" is a convenient general term to describe any place in which wastes are managed.... Congress thus did not ascribe one fixed definition to the term, intending instead

5. *Cf. Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored....") (citations omitted).

that its precise meaning depend upon the context in which it is used.

Brief for EPA at 22. We believe that the agency's position is amply justified both by logic and by precedent. Congress has given no indication that a uniform interpretation of this term was somehow integral to the statutory scheme. If the expert agency believes that the legislative purposes will best be satisfied by construing the term to mean different things in different contexts, then it may act upon that premise. This court has previously upheld the agency's decision to employ different definitions of the term "facility" in construing different portions of the RCRA. *See United Technologies Corporation v. U.S. Environmental Protection Agency*, 821 F.2d 714, 721–23 (D.C.Cir.1987).

Moreover, this is not the only time that the agency, in interpreting the RCRA, has read the word "facility" to refer to individual units. The EPA has adopted this reading in its implementation of § 3004(g)(6), the statutory provision dealing with "soft hammer" wastes.[6] *See* 53 Fed.Reg. 31,186 (August 17, 1988). Mobil appears to concede that this is a permissible interpretation of § 3004(g)(6). *See* Brief for Petitioner at 25–26. Thus, to accept petitioner's interpretation of § 3004(h)(4) would not eliminate the "problem"—differing interpretations of the word "facility" in different parts of the statute—to which Mobil has directed our attention.

C. *Policy Concerns*

[3] The EPA's new interpretation of § 3004(h)(4) also appears consonant with the policies underlying Congress' decision to grant national capacity variances in certain limited circumstances. Whenever a national capacity variance is granted, the agency is by definition allowing the land disposal of waste in a manner that does not comply with applicable standards. Congress was plainly concerned, however, that even during variance periods hazardous wastes should be disposed of in a safe and responsible manner. Certainly it was reasonable for the agency to construe the variance provisions narrowly so that the statutory scheme is not undermined. The statute in essence reflects the view that if adherence to the treatment standards is not feasible, then companies should be required to do the next best thing. The next best thing in this context is disposal in a *unit* that complies with the § 3004(*o*) requirements, not simply disposal in a noncomplying old unit in a treatment complex whose new units meet the requirements.

D. *Legislative History*

Although the legislative history is not in itself determinative of the question, it does lend further support to the EPA's construction of the statutory language. The Conference Report to the 1984 amendments discussed the treatment requirements which would apply when a case-by-case capacity variance was granted under § 3004(h)(3). The Report stated that "[f]or the duration of any such extension, use of landfills or surface impoundments for such wastes is restricted to those that meet the minimum technological requirements of the bill *for new facilities*." H.R.Conf.Rep. No. 1133, 98th Cong., 2d Sess. 87 (1984), U.S. Code Cong. & Admin.News 1984, pp. 5576, 5658 (emphasis supplied). The italicized language plainly suggests that disposal in an old, unlined unit would not meet the statutory requirements for land disposal during a case-by-case extension. Since § 3004(h)(4) governs the land disposal of hazardous wastes during case-by-case extensions and national capacity variance periods, the same result should obtain in the present case.

Congressman Florio, a sponsor of the 1984 amendments, spoke to the same effect when he discussed the disposal restrictions applicable to soft-hammer and national ca-

6. "Soft-hammer" wastes are wastes for which the EPA has failed to set treatment standards by the date prescribed by statute. These wastes may be disposed in a landfill or surface impoundment only if "such facility is in compliance with the requirements of subsection (*o*) of this section which are applicable to new facilities (relating to minimum technological requirements)." RCRA § 3004(g)(6), 42 U.S.C. § 6924(g)(6). *See Chemical Waste Management, supra*, 869 F.2d at 1530 n. 3.

pacity variance wastes. The Congressman stated that "[i]f EPA fails to meet either of its first two deadlines and if there is no treatment capacity, then the wastes that have not been reviewed would have to be sent to land disposal facilities that are double-lined and have leachate collection systems." 130 Cong.Rec. H11,142 (daily ed. October 3, 1984).[7] The reference to "facilities that are double-lined" indicates that the "facilities" at issue are individual units —not the larger disposal complexes.

III. Conclusion

Though the challenged regulatory approach represents a change in agency policy, the EPA has acknowledged that change and has cogently explained the reasons for it. We believe that the agency's new interpretation is entirely reasonable in light of the statutory language, the policies underlying the Act, and the legislative history. The petition for review is accordingly

Denied.

7. Congressman Florio seems plainly to have been speaking both of soft-hammer wastes (standards for which would come into play "[i]f EPA fails to meet either of its first two deadlines") and national capacity variance wastes (these statutory provisions would be invoked "if there is no treatment capacity"). The fact that the Congressman spoke of the two in tandem lends further support to the EPA's conclusion that both sorts of waste should be subject to the same treatment requirements.

UNITED TECHNOLOGIES CORPORATION, Pratt & Whitney Group, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent,

American Petroleum Institute, American Iron and Steel Institute, Edison Electric Institute, et al., Chemical Manufacturers Association, Intervenors.

ENVIRONMENTAL DEFENSE FUND, INC., et al., Petitioners,

v.

Lee M. THOMAS, Administrator and U.S. Environmental Protection Agency, Respondents,

American Petroleum Institute, American Iron and Steel Institute, Edison Electric Institute, et al., Chemical Manufacturers Association, Intervenors.

AMERICAN PETROLEUM INSTITUTE, Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents,

Edison Electric Institute, American Iron and Steel Institute, Intervenors.

AMERICAN IRON AND STEEL INSTITUTE, Petitioner,

v.

Lee M. THOMAS, Administrator and U.S. Environmental Protection Agency, et al., Respondents,

American Petroleum Institute, Edison Electric Institute, Chemical Manufacturers Association, Intervenors.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION of the UNITED STATES, INC., Petitioner,

v.

Lee M. THOMAS, Administrator and U.S. Environmental Protection Agency, Respondents,

American Petroleum Institute, American Iron and Steel Institute, Edison Electric Institute, et al., Chemical Manufacturers Association, Intervenors.

EDISON ELECTRIC INSTITUTE, et al., Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondent,

American Petroleum Institute, American Iron and Steel Institute, Chemical Manufacturers Association, Delmarva Power and Light Company, Intervenors.

Nos. 85–1654, 85–1655, 85–1658 to 85–1660 and 85–1662.

United States Court of Appeals, District of Columbia Circuit.

Argued April 2, 1987.

Decided June 23, 1987.

In consolidated cases, petitioners sought review of final rule promulgated by the Environmental Protection Agency to conform its hazardous waste regulations to the Hazardous and Solid Waste Amendments of 1984. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that: (1) rule is "interpretive" in nature and thus not subject to notice and comment procedures; (2) even if some of the regulations could plausibly be classified as "legislative," agency properly invoked "good cause" exception to notice and comment requirement; (3) EPA's definition of "facility" for purposes of regulation was consistent with statute and congressional intent underlying 1984 Amendments; and (4) regulations were invalid to extent they imposed certain technological requirements on owners and operators of hazardous waste facilities whose applications for final determination on their permits were received before November 8, 1984.

Affirmed; reversed and remanded in part.

1. Administrative Law and Procedure ⇐394

Health and Environment ⇐25.5(9)

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hazardous waste regulations to the Hazardous and Solid Waste Amendments of 1984 was "interpretive" in nature and thus not subject to notice and comment procedures, considering that rule was an attempt to construe specific statutory provisions, and validity of its regulations depended on whether agency correctly interpreted congressional intent; moreover, assuming that some regulations could plausibly be classified as "legislative," agency properly invoked "good cause" exception to notice and comment requirement. Solid Waste Disposal Act, § 1002 et seq., as amended, 42 U.S.C.A. § 6901 et seq.; 5 U.S.C.A. § 553(b)(A).

2. Administrative Law and Procedure ⇐706

Health and Environment ⇐25.15(3.2)

Court of Appeals lacked jurisdiction to consider petition for review of final rule promulgated by Environmental Protection Agency to conform its hazardous waste regulations to Hazardous and Solid Waste Amendments of 1984, which asserted that passage of Amendments required certain changes in EPA groundwater monitoring regulations, since petition could not be seen as challenging regulations actually promulgated in final rule, and petition did not ask EPA to promulgate regulations implementing new groundwater monitoring procedures. Solid Waste Disposal Act, §§ 1002 et seq., 7006(a)(1), as amended, 42 U.S.C.A. §§ 6901 et seq., 6976(a)(1).

3. Health and Environment ⇐25.5(5.5)

Environmental Protection Agency's definition of "facility" as not limited to portions of property on which units for management of solid or hazardous wastes are located, but extending to all contiguous property under control of owner or operator, for purposes of regulation, is consistent with section of Hazardous and Solid Waste Amendments of 1984 and with congressional intent underlying the 1984 Amendments. Solid Waste Disposal Act, § 3004(u), as amended, 42 U.S.C.A. § 6924(u).

4. Health and Environment ⇐25.5(5.5)

Regulations implementing the Hazardous and Solid Waste Amendments of 1984 were invalid to extent they imposed certain technological requirements on owners and operators of hazardous waste facilities whose applications for final determination on their permits were received before November 8, 1984. Solid Waste Disposal Act, §§ 3004(*o*), 3005, as amended, 42 U.S.C.A. §§ 6924(*o*), 6925.

5. Administrative Law and Procedure ⇐704

Health and Environment ⇐25.15(3.2)

Claim that regulation implementing Hazardous and Solid Waste Amendments of 1984 was invalid because it went beyond scope of Solid Waste Disposal Act by imposing duty to take corrective action for releases from solid waste management units devoted to handling fossil fuel combustion wastes was not ripe for adjudication, considering that EPA had taken no position as to whether regulation applied to fossil fuel combustion wastes, and had not taken any enforcement action with respect to releases from fossil fuel combustion waste management units. Solid Waste Disposal Act, §§ 3001(b)(3), (b)(3)(A, C), 3004(u), as amended, 42 U.S.C.A. §§ 6921(b)(3), (b)(3)(A, C), 6924(u).

Petitions for Review of Orders of the U.S. Environmental Protection Agency.

James B. Atkin, San Francisco, Cal., with whom were Frederic D. Chanania and Arnold S. Block, Washington, D.C., for American Petroleum Institute, petitioner in No. 85–1658 and intervenor in Nos. 85–1654, 85–1655, 85–1659, 85–1660 and 85–1662.

Robert Wise and John W. Casey, for United Technologies Corp., Pratt & Whitney Group, petitioner in No. 85–1654.

Gary H. Baise, Karl S. Bourdeau and Paul E. Shorb, III, for American Iron and Steel Institute, petitioner in No. 85–1659 and intervenor in Nos. 85–1654, 85–1655, 85–1658, 85–1660 and 85–1662.

John T. Smith, II, David F. Zoll and Kenneth M. Kastner, for Chemical Mfrs. Ass'n,

intervenor in Nos. 85–1654, 85–1655, 85–1659, 85–1660, 85–1662 were on the joint brief for petitioners and intervenors. Stark Ritchie and John B. Fahey also entered appearances.

William R. Weissman, Washington, D.C., with whom Charles C. Abeles and Douglas H. Green, were on brief, for Edison Elec. Institute, et al., petitioner in No. 85–1662 and intervenor in Nos. 85–1654, 85–1655, 85–1658, 85–1659 and 85–1660 and Delmarva Power and Light Company, intervenor in No. 85–1662. Sue M. Briggum also entered an appearance.

Robert V. Percival, Washington, D.C., with whom David G. Lennett, Jane L. Bloom and Donald Strait, were on brief, for Environmental Defense Fund, et al., petitioners in No. 85–1655.

Robert A. Fineman, Detroit, Mich., Joseph M. Polito and William H. Crabtree, were on brief, for Motor Vehicle Mfrs. Ass'n of the U.S., Inc., petitioner in No. 85–1660.

Michael A. McCord, Washington, D.C., Atty., Dept. of Justice and Christina Kaneen, Atty., E.P.A., of the Bar of the Supreme Court of Illinois, pro hac vice by special leave of the Court, with whom Mark A. Greenwood, Asst. Gen. Counsel and Barbara E. Pace, Atty., E.P.A., were on brief, for respondents in Nos. 85–1654, 85–1655, 85–1658, 85–1659, 85–1660 and 85–1662.

Before EDWARDS and STARR, Circuit Judges, and SWYGERT,* Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by Circuit Judge EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

These consolidated cases involve various challenges to a final rule promulgated by the Environmental Protection Agency ("EPA" or the "Agency") to conform its hazardous waste regulations to new statutory provisions enacted in the Hazardous and Solid Waste Amendments of 1984, Pub.L. No. 98–616, 98 Stat. 3221 (the "1984 Amendments"). The 1984 Amendments were enacted by Congress to modify and augment the hazardous waste provisions of the Resource Conservation and Recovery Act of 1976 ("RCRA" or the "Act"). *See* Hazardous Waste Management System; Final Codification Rule (the "Final Rule"), 50 Fed.Reg. 28,702 (1985) (codified in scattered sections of 40 C.F.R. pts. 260–262, 264–266, 270–271, 280 (1986)).

Based on our careful review of the Final Rule, and the arguments advanced by the parties, we conclude that the regulations promulgated by the EPA are, *for the most part*, reasonable and consistent with the 1984 Amendments. There is one aspect of the Final Rule, however, that is inconsistent with the plain meaning of the 1984 Amendments. Accordingly, we affirm in part and reverse and remand in part.

I. Background

Subtitle C of the RCRA, 42 U.S.C. §§ 6921–6934 (1982), established a "cradle-to-grave" regulatory structure overseeing the safe treatment, storage and disposal of hazardous waste. Under the Act, the EPA is required to identify those solid wastes that are subject to regulation as hazardous waste,[1] and to promulgate regulations establishing performance standards applicable to owners and operators of new and existing facilities engaged in the treatment, storage and disposal of hazardous waste.

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

1. Under the Act, the term "solid waste" generally encompasses garbage, refuse, sludge or discarded material, excluding wastes contained in irrigation and domestic sewage systems and waste regulated by certain other statutory programs. 42 U.S.C. § 6903(27) (1982). The term "hazardous waste" means a solid waste which may "cause, or significantly contribute to an increase in mortality or ... illness," or "pose a substantial ... hazard to human health or the environment when improperly ... managed." 42 U.S.C. § 6903(5) (1982). Thus, although all hazardous wastes are solid wastes, not all solid wastes are hazardous wastes. The Agency has identified and listed hazardous wastes subject to regulation under the Act in 40 C.F.R. pt. 261 (1986).

Section 3004(a) of the Act, 42 U.S.C. § 6924(a) (Supp. III 1985). Under section 3005 of the RCRA, 42 U.S.C. § 6925 (1982 & Supp. III 1985), owners and operators of such treatment, storage or disposal facilities must obtain operating permits from the Agency or from a state authorized by the EPA to issue such permits. Because many hazardous waste management facilities were already in operation when Subtitle C was enacted, Congress allowed existing facilities to operate on an "interim status" basis, until administrative action is taken on a section 3005 permit. Section 3005(e) of the Act, 42 U.S.C. § 6925(e) (Supp. III 1985). All permittees are required to comply with applicable section 3004 standards. Section 3005(c) of the Act, 42 U.S.C. § 6925(c) (Supp. III 1985).

The EPA has promulgated several sets of regulations implementing Subtitle C of the RCRA. *See* 40 C.F.R. pts. 260–266, 270, 271 (1986). The section 3004 standards applicable to facilities with permits are set forth in Part 264. Part 265 sets forth the standards applicable to facilities operating under interim status.

Although the RCRA, as originally enacted, imposed a regulatory scheme on the active management of hazardous wastes, it did not require permittees to take significant remedial action to correct past mismanagement of hazardous waste. In 1980, however, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601–9657 (1982), to provide for the cleanup of hazardous releases not addressed by other statutory programs. Included in CERCLA was a "Superfund" to pay for such corrective action pending recovery of the cleanup costs from the owner or operator who was responsible for the release.

Congress comprehensively amended the RCRA in 1984, when it enacted the 1984 Amendments. The 1984 Amendments imposed additional section 3004 requirements on permittees. Of particular relevance here is section 3004(*o*)(1)(A), 42 U.S.C. § 6924 (*o*)(1)(A) (Supp. III 1985), which requires every landfill or surface impoundment unit for which an application for a final determination regarding the issuance of a permit is received after November 8, 1984 to conform with certain design and monitoring requirements. Also, under section 3004(u), 42 U.S.C. § 6924(u) (Supp. III 1985), owners and operators must take corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a facility regardless of the time at which waste was placed in the unit.

The Agency then proceeded to promulgate regulations to implement the 1984 Amendments. On July 15, 1985, it issued the Final Rule, the purpose of which was "to incorporate into the existing Subtitle C regulations a set of requirements from the new RCRA amendments that became effective as a matter of statute in the short term." 50 Fed.Reg. at 28,703. The Final Rule was made effective immediately and was promulgated without prior notice or an opportunity for comment by interested parties. Thereafter, the Agency promulgated other regulations implementing other aspects of the 1984 Amendments, which were subjected to notice and comment procedures before adoption as a final rule. *See* Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Final Rule, 52 Fed.Reg. 8704 (1987). As of this date, the Agency is considering petitions seeking the promulgation of additional regulations to flesh out portions of the 1984 Amendments. *See* Request for Stay Pending Judicial Review or for Reconsideration, *reprinted in* Addendum A to Brief for the Respondent.

Several groups of petitioners have asked this court to review various aspects of the Final Rule. One group, hereafter referred to as "Industry Petitioners," [2] is composed of industrial concerns that, as a by-product of their production processes, generate hazardous waste that they manage on-site. Several utilities and utility associations (including the Edison Electric Institute), hereinafter referred to as "EEI," have also

2. The Motor Vehicle Manufacturers Association has also filed a petition for review.

challenged certain of the regulations. Finally, the Environmental Defense Fund and the Natural Resources Defense Council (collectively "EDF") have filed a petition for review.

II. Procedural Issues

The Industry Petitioners contend that, because the Final Rule was promulgated without notice and comment under the Administrative Procedure Act ("APA"), the Final Rule must be invalidated. The EPA, however, maintains that the Final Rule is an "interpretative" rule, and thus outside the scope of the notice and comment requirement. Alternatively, the EPA contends that, even if the Final Rule is a "legislative" rule, the Agency properly invoked the "good cause" exception to the notice and comment requirement. We agree that most, if not all, of the Final Rule is "interpretative" in nature, and thus is not subject to notice and comment procedures. As to those portions of the Final Rule that arguably are "legislative" in nature, we find that the Agency properly invoked the "good cause" exception.

The EPA also asserts that, because EDF's claims are addressed at the failure of the Agency to promulgate certain regulations rather than at deficiencies in the Final Rule itself, EDF's petition for review is not properly before this court at this time. We agree. Although it is possible that a suit may be lodged in this court at some point in the future, EDF has not properly invoked this court's jurisdiction at this point.

A. *"Interpretative" versus "Legislative" Rules*

[1] The APA specifically excludes "interpretative" rules from its notice and comment procedures. 5 U.S.C. § 553(b)(A) (1982). The meaning of this exclusion was amplified by the court sitting *en banc* in *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C.Cir.1984) (en banc), *cert. denied*, 471 U.S. 1074, 105 S.Ct. 2153, 85 L.Ed.2d 509 (1985), in which certain general principles were set forth to be used in determining whether or not a rule is interpretative. As a starting point, the court found that the agency's characterization of a rule is "relevant," although not necessarily "dispositive." As a more general principle, however, the court offered the following test to distinguish between interpretative and legislative rules: "An interpretative rule simply states what the administrative agency thinks the [underlying] statute means, and only ' "reminds" affected parties of existing duties.' On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *Id.* (quoting *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 n. 153 (D.C.Cir.1979)) (citations omitted).

Applying these general principles in *General Motors*, the court found the rule at issue to be interpretative because the agency characterized the rule as interpretative, the "entire justification for the rule [was] comprised of reasoned statutory interpretation, with reference to the language, purpose and legislative history" of the statute, and "the rule did not create any new rights or duties; instead. it simply restated the consistent practice of the agency" in construing the underlying statutory provision. *Id.* Stated slightly differently, " 'interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.' " whereas legislative rules have "effect[s] *completely independent* of the statute." *Cabais v. Egger*, 690 F.2d 234, 238 & n. 9 (D.C.Cir.1982) (emphasis in original) (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C.Cir.1952)).

Turning to the Final Rule in the instant case, we find that most if not all of it is properly viewed as interpretative. The Agency clearly so viewed it. It saw the "principal purpose" of the Final Rule as being "to codify the new statutory requirements" of the 1984 Amendments. 50 Fed. Reg. at 28,703. In the preamble to the Final Rule, the EPA explained and interpreted its regulations, not by reference to whether the Agency was reasonably exercising its delegated power to promulgate rules, but by reference to "its view of what Congress intended these new requirements

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to be. Such statements of statutory interpretation are derived from the legislative history and EPA's view of Congressional purposes for the new requirements." *Id.* Indeed, the EPA carefully segregated out proposed rules which "deal with issues that are logical outgrowths of the new provisions rather than matters addressed directly by the statutory language," *id.*, and has subjected those rules to notice and comment procedures. *See* Hazardous Waste Management System; Proposed Rule, 51 Fed.Reg. 10,706 (1986).

We find it irrelevant that the Agency, in an abundance of caution, also invoked the "good cause" exception to the APA notice and comment requirement. *See* 5 U.S.C. § 553(b)(B) (1982). This did not change the character of the rule from interpretative to legislative. Rather, it merely assured that, if a court determined that any portion of the Final Rule was legislative, the Agency had on record its justifications for an invocation of the "good cause" exception. The main point here is that most of the regulations at issue are prototypically interpretative in nature, because they merely reflect the Agency's view of statutory duties imposed by the 1984 Amendments.

The Industry Petitioners contend that at least some of the regulations at issue "create[ ] legal obligations not spelled out ... explicitly by statute and thus create[ ] corresponding 'new duties' in affected parties." *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 n. 153 (D.C.Cir. 1979). The Industry Petitioners, however, have misread our cases. Apparently, they read *Spencer County* and other cases to hold that, where congressional intent may not be discerned from the plain meaning of a statute, an agency's interpretation of the meaning of the statutory provision is a legislative rule, rather than an interpretative rule. In other words, rules that "interpret" rather than "restate" statutory language are not "interpretative." Such a narrow view of what constitutes an interpretative rule would make little sense as a logical or practical matter, and is refuted by the case law.

In *Spencer County*, for example, the rules found to be legislative were rules in which the agency sought to fill gaps and inconsistencies left by the statutory scheme. *See id.* at 879. In other words, the rules picked up where the statute left off; "by no stretch of the imagination could [they] have been derived by mere 'interpretation' of the instructions of Congress." *Id.* The proper distinction between legislative and interpretative rules is shown even more clearly in *Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C.Cir. 1980). There, after a judicial determination that neither the Occupational Safety and Health Act of 1970 (the "OSHA Act"), nor section 3(*o*) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(*o*) (1982), *required* that employees be compensated for time spent accompanying OSHA inspectors during work site examinations, *see Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C.Cir.1975), the Department of Labor promulgated a rule requiring employers to so compensate their employees. The court reasoned that such a rule could not be interpretative because its decision in *Leone* foreclosed the possibility that any statutory provision of either the FLSA or the OSHA Act imposed a duty for employers to pay employees for time spent accompanying inspectors during on-site inspections. Because "Congress ha[d] not 'legislated and indicated its will' on the question ...[,] the Administration must have done more than exercise its ' "power to fill up the details." ' " 636 F.2d at 469 (quoting *United States v. Grimaud*, 220 U.S. 506, 517, 31 S.Ct. 480, 483, 55 L.Ed. 563 (1911) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). Rather, "the Administration has attempted through th[e] regulation to *supplement* the [OSHA] Act, not simply to construe it, and therefore the regulation must be treated as a legislative rule." *Id.* (emphasis added).

Thus, these cases show that what distinguishes interpretative from legislative rules is the legal base upon which the rule rests. If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an

interpretative rule. If, however, the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one. Here, there is no question that the Final Rule is an attempt to construe specific statutory provisions. The validity of the regulations depends on whether or not the Agency has correctly interpreted congressional intent as expressed in the 1984 Amendments. As such, it is clearly an interpretative rule.

B. *The "Good Cause" Exception*

Assuming, *arguendo*, that at least some of the regulations could plausibly be classified as "legislative," the Agency properly invoked the "good cause" exception to the notice and comment requirement. Pursuant to 5 U.S.C. § 553(b)(B) (1982), the Agency published, along with the Final Rule, a statement setting forth its reasons for finding that following notice and comment procedures would be "impracticable, unnecessary, or contrary to the public interest." It provided three principal reasons: (1) Congress explicitly authorized the use of the good cause exception in the promulgation of these regulations; (2) there was need for immediate action; and (3) the nature of the regulations was such that the Agency would not be likely to reap any benefits from allowing public comment. 50 Fed.Reg. at 28,703–04. We agree that, given the nature of these regulations, and the applicable legislative history expressed in the Conference Committee Report,[3] the Agency acted properly in dispensing with the notice and comment requirement, even if the rule was legislative. Although we construe the good cause exception narrowly, *see New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C.Cir.1980), we are persuaded that the Agency's decision not to use notice and comment procedures was consistent with congressional intent and reasonable under the circumstances.

C. *This Court Lacks Jurisdiction to Consider EDF's Petition*

[2] EDF claims that the passage of section 3004(u) requires certain changes in the EPA groundwater monitoring regulations. Generally, these regulations are designed to determine if an owner or operator must take corrective action for a release of a contaminant from a regulated unit into the surrounding groundwater system. As currently written, these regulations require only that the background wells of monitoring systems "not be[ ] affected by leakage from a regulated unit." 40 C.F.R. § 264.97(a)(1) (1986). EDF argues that, in light of the section 3004(u) duty to take corrective action for releases not only from regulated—*i.e.*, hazardous waste—management units but also for releases from solid waste—*i.e.*, non-regulated—management units, the groundwater monitoring procedures must be modified to enable the Agency to determine that groundwater is not being contaminated by either regulated or non-regulated units.

Whatever the merits of EDF's contention, its suit is not properly before us at this time. Our jurisdiction in these cases stems from section 7006(a)(1) of the Act, 42

3. The Conference Committee Report stated:

> For those provisions of this Act which are immediately effective, it would be contrary to the public interest and impracticable for EPA to engage in the time-consuming rulemaking procedures required by Section A of the APA, 5 U.S.C. Section 553, to carry out swiftly it[s] statutory mandate. Therefore, for such immediately effective provisions, EPA appropriately may invoke the "good cause" exemption of 5 U.S.C. Section 553(b)(B) and (d)(3), in issuing final substantive or interpretative rules to implement those provisions. This will enable the Agency to put into place swiftly the enacted requirements.

H.R.CONF.REP.No. 1133, 98th Cong., 2d Sess. 112, *reprinted in* 1984 U.S.CODE CONG. & ADMIN.NEWS 5576, 5649, 5683 ("Conference Report"). Although the views of the Conference Committee alone might not be sufficient to satisfy the requirements of section 553(b)(B), we do find them to be an indication of congressional intent that is relevant to the section 553(b)(B) analysis. *Cf. New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C.Cir.1980) ("[J]udicial review of a rule promulgated under an exception to the APA's notice-and-comment requirement must be guided by Congress's expectation that such exceptions will be narrowly construed."). We thus cannot ignore a congressional expectation that notice and comment would be unnecessary in promulgating the Final Rule.

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U.S.C. § 6976(a)(1) (1982), which grants exclusive jurisdiction to this court for "petition[s] for review of action of the Administrator in promulgating any regulation, or requirement under [the Act]." We also have jurisdiction to review any action of the EPA "denying any petition for the promulgation, amendment or repeal of a regulation under [the Act]." *Id.* EDF's claim is that the EPA should have promulgated a rule which, up until now, it has not promulgated. It cannot sensibly be seen as challenging the regulations actually promulgated in the Final Rule. The details of a groundwater monitoring program are a matter to be resolved through the use of the Agency's expertise in selecting the appropriate method of ascertaining compliance with statutory and regulatory norms. No specific method is mandated by the Act or by the 1984 Amendments. Indeed, EDF has petitioned the Agency to promulgate regulations implementing new groundwater monitoring procedures, but the EPA has not yet acted on its petition. *See* Request for Stay Pending Judicial Review or for Reconsideration, *reprinted in* Addendum A to Brief for the Respondent. When the Agency acts on the petition, either EDF can seek judicial review of the Agency's decision to deny its petition, or, if the Agency promulgates new regulations relating to groundwater monitoring, EDF might be able to seek judicial review of those regulations at that time. At this juncture, however, judicial review would be premature.

Of course, the Agency may not unreasonably delay in ruling on EDF's petition. Under our decision in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C.Cir.1984), EDF may pursue an action in this court to compel the Agency to act on its petition. However, this is not the suit that EDF has brought before us, and we express no opinion on the merits of any such claim. At this point, we have no jurisdiction to entertain EDF's petition.

III. The Merits

A. *Interpretation of "Facility"*

[3] Section 3004(u) of the Act, 42 U.S.C. § 6924(u) (Supp. III 1985), requires owners and operators to take "corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility ... regardless of the time at which waste was placed in such unit." To implement section 3004(u) in its regulatory scheme, the EPA promulgated 40 C.F.R. § 264.101 (1986), which provides in pertinent part that "[t]he owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action ... for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of time at which waste was placed in such unit." In its preamble to the Final Rule, the EPA stated that, based on its examination of congressional intent underlying section 3004(u), it would be interpreting the term "facility" as used in section 264.101 as "not limited to those portions of the owner's property at which units for the management of solid or hazardous waste are located, but rather extend[ing] to *all contiguous property under the owner or operator's control.*" 50 Fed.Reg. at 28,712 (emphasis added).

The Industry Petitioners challenge this definition of "facility." They claim that the Agency's definition is incompatible with the plain language of section 3004(u) and is inconsistent with congressional intent. Alternatively, they contend that, in the absence of congressional intent to the contrary, the Agency is "bound" to employ the definition of "facility" it promulgated in 1980, codified at 40 C.F.R. § 260.10 (1986). We disagree. We find that the plain language of section 3004(u) does not require the use of the Industry Petitioners' definition of facility. We also reject the claim that the EPA was somehow "bound" to employ its prior definition of facility. Employing standard tools of statutory construction, we find the EPA's definition of facility for purposes of section 264.101 to be consistent with section 3004(u) and with the congressional intent underlying the 1984 Amendments. Moreover, even if con-

gressional intent were inconclusive on this point, we would uphold the Agency's interpretation as reasonably filling in gaps left by Congress when it enacted the 1984 Amendments.

1. *The Plain Language of Section 3004(u)*

The Industry Petitioners first urge that the EPA's definition of "facility" is inconsistent with the directive in section 3004(u) to take corrective action "*at* a treatment, storage or disposal facility." They argue that the word "at" clearly shows an intent to limit the duty to take corrective action only to "contiguous land ... used for treating, storing, or disposing of hazardous waste." 40 C.F.R. § 260.10 (1986). However, this would virtually nullify the requirement, to take corrective action for releases from any *solid waste* management unit. Under the Industry Petitioners' view, the only way a duty would attach to take corrective action for releases from a solid waste unit would be if that solid waste unit happened to be on the "contiguous land ... used for ... hazardous waste."

We fail to see how the use of the word "at" in section 3004(u) clarifies, in any way, the meaning to be placed on the word "facility." It certainly does not *require* the use of the Industry Petitioners' definition. Moreover, looking at section 3004(u) as a whole, it appears that employing the Industry Petitioners' definition would render the duty to take corrective action for releases from solid waste management units virtually meaningless. Absent some affirmative showing that Congress intended to achieve such an anomalous result, we are not persuaded that the EPA misconstrued the statutory language.

2. *Congressional Intent*

The Agency argues that its interpretation of the word "facility" in this context, if not mandated by the plain wording of section 3004(u), is consistent with the congressional scheme underlying the 1984 Amendments. It notes first that the broad purpose underlying this aspect of the 1984 Amendments was to relieve future burdens on the "Superfund" program. *See* H.R. REP. No. 198, 98th Cong., 1st Sess. 20, 61, *reprinted in* 1984 U.S. CODE CONG. & ADMIN.NEWS 5576, 5579, 5620 ("House Report"). As the House Report stated: "Unless all ... releases ... at permitted facilities are ... cleaned up ... many more sites will be added to the future burdens of the Superfund program.... The responsibility to control such releases lies with the facility owner and operator and should not be shifted to the Superfund program, particularly when a final permit has been requested by the facility." *Id.* at 61, *reprinted in* 1984 U.S. CODE CONG. & ADMIN.NEWS at 5620. The Agency also reasons that, since section 3004(v), 42 U.S.C. § 6924(v) (Supp. III 1985), clearly employs a broader concept of a "facility" than does the section 260.10 definition, one can reasonably assume a similarly broad meaning of "facility" was intended in section 3004(u).

Section 3004(u) was enacted out of congressional concern "that current EPA regulations do not address all releases of hazardous constituents from solid waste management units at facilities receiving permits under section 3005(e). This could likely result in a situation of EPA issuing a final permit to a facility which is causing ground water contamination from inactive units, without the permit addressing that contamination in any way." House Report at 60, *reprinted in* 1984 U.S. CODE CONG. & ADMIN.NEWS at 5619; *see also* Conference Report at 92, *reprinted in* 1984 U.S. CODE CONG. & ADMIN.NEWS at 5663. Section 3004(u), in essence, creates the broad duty to take corrective action as a *quid pro quo* to obtaining a permit. Given this purpose, it appears that the EPA's construction of "facility" is fully consistent with congressional intent.

This view is further confirmed by section 3004(v), which requires an owner or operator to use best efforts to take corrective action "beyond the facility boundary." The provision is satisfied if the owner or operator is "unable to obtain the necessary permission to undertake such action." Clearly, "facility" is used in section 3004(v) to describe all of the property under the con-

trol of the owner or operator. We have no reason to assume that Congress intended a different meaning of facility in section 3004(u).

We can find no basis for overturning the EPA's interpretation of "facility" in this case. Indeed, even if we were "unable to discern congressional intent after employing traditional tools of statutory construction," *UAW v. Brock*, 816 F.2d at 765 n. 5 (D.C.Cir. April 24, 1987), we would still uphold the Agency's interpretation. It is clear to us that, to the extent there is "'any gap left, implicitly or explicitly, by Congress,'" *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974)), the Agency has acted to fill that gap in a way that is rational and not inconsistent with the 1984 Amendments. Accordingly, we "must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *INS v. Luz Marina Cardoza-Fonseca*, — U.S. —, 107 S.Ct. 1207, 1222, 94 L.Ed.2d 434 (1987).

3. *The Agency is not Required to Employ Its Prior Definition in Construing a New Congressional Enactment*

The Industry Petitioners next contend that, in any event, *i.e.*, without regard to the reasonableness of the EPA's current interpretation, the Agency is bound by its prior rulemaking to employ the initial definition of facility. This argument is wholly without merit.

The Industry Petitioners apparently have failed to recognize that the Agency has not "changed" its prior definition of facility; the EPA will continue to use the section 260.10 definition in construing other regulatory and statutory provisions under the RCRA. This case is thus unlike *International Brotherhood of Electrical Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 712 n. 65 (D.C.Cir.1987), and *Oil, Chemical & Atomic Workers International Union v. NLRB*, 806 F.2d 269, 273–74 (D.C.Cir.1986), each of which involved a *change* in an agency's interpretation of a statutory provision. Even in those cases, however, the agencies were not "bound" to follow their prior views, but simply had to supply a justification for abandoning their prior positions. Here, the Agency has interpreted *newly* enacted statutory language, so it is hardly surprising that EPA officials did not feel constrained by the previously existing definition of facility. Furthermore, and most importantly, the EPA adequately explained its reasons for departing from the section 260.10 definition, thus making clear the reasonableness of its position. *See* 50 Fed.Reg. at 28,712.

4. *The Agency Will Not be Exceeding its Authority*

The Industry Petitioners fear that, as a result of the Agency's interpretation of facility, the EPA will be free to intrude into their production processes and those areas of their properties not used for the management of solid waste. However, by its terms, section 264.101 is limited to releases from solid waste management units. Indeed, in the preamble to the Final Rule, the EPA specifically addressed the Industry Petitioners' concerns. The Agency stated that it did not "believe that section 3004(u) applie[d] to spills that cannot be linked to solid waste management units. For example, a spill from a truck travelling through a facility would not constitute a release from a solid waste management unit." 50 Fed.Reg. at 28,713–14.

We fail to comprehend any legitimate basis for the Industry Petitioners' asserted fears. Nothing in section 264.101 as written, or as the Agency has stated that it will be applied, would result in the Agency exceeding its authority under the Act.

B. *Applicability of Section 3004(o)(1)(A) to All Permits Granted After November 8, 1984*

[4] Section 3004(*o*)(1) of the Act, 42 U.S.C. § 6924(*o*)(1) (Supp. III 1985), imposes certain technological requirements on owners or operators whose "application for

a final determination regarding issuance of a permit under section [3005(c)] is received after November 8, 1984." Despite this clear statutory language, the EPA announced that it would interpret 40 C.F.R. §§ 265.221, 265.301 (1986), which implement section 3004(*o*)(1), to apply to all permits *granted* after November 8, 1984, rather than to applications for a final determination *received* after November 8, 1984. *See* 50 Fed.Reg. at 28,708 n. 7. In the face of clear statutory language, such as that contained in section 3004(*o*)(1), we cannot possibly uphold the Agency's position. "The principal charge of a court in statutory construction is to ascertain congressional intent. 'If a court ... ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" *UAW v. Brock*, 816 F.2d at 764 (D.C.Cir. Apr. 24, 1987) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 2781 n. 9, 81 L.Ed.2d 694 (1984)). *See also Burlington N.R.R. v. Oklahoma Tax Comm'n*, — U.S. —, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404 (1987) ("Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981))). In the instant case, section 3004(*o*)(1) is absolutely clear, and it must be enforced according to its terms.[4]

C. *Applicability of Section 264.101 to Fossil Fuel Combustion Wastes*

[5] EEI claims that 40 C.F.R. § 264.101(a) (1986) appears to require owners and operators to take corrective action "for *all* releases of hazardous waste or constituents from *any* solid waste management unit at the facility," without explicitly exempting solid waste management units devoted to the handling of fossil fuel combustion wastes. It maintains that section 3001(b)(3)(A) of the Act, 42 U.S.C. § 6921(b)(3)(A) (1982), specifically exempts fossil fuel combustion wastes from regulation under the Act, unless and until the procedures set forth in section 3001(b)(3)(C) of the Act, 42 U.S.C. § 6921(b)(3)(C) (1982), are complied with. EEI argues that, because the section 3001(b)(3) exemption was not repealed by the 1984 Amendments, section 3004(u) cannot be seen as relieving the Agency of the obligation to perform the study required under section 3001(b)(3)(C) before placing fossil fuel combustion wastes within the regulatory scope of the Act. Because the Agency never conducted such a study, EEI contends that section 264.101(a) goes beyond the scope of the Act to the extent that it imposes a duty to take corrective action for releases from solid waste management units devoted to handling fossil fuel combustion wastes.

It is clear to us that, in formulating section 264.101(a), the Agency merely mirrored the language used in section 3004(u). At oral argument, the EPA maintained that it has taken no position as to whether section 264.101(a) applies to fossil fuel combustion wastes. Moreover, the Agency has assured us that it does not currently seek to take any enforcement actions with respect to releases from fossil fuel combustion waste management units. According-

4. The Agency argues that section 3004(*o*) as written is inconsistent with section 3015(b)(1) of the Act, 42 U.S.C. § 6936(b)(1) (Supp. III 1985). Section 3015(b)(1) imposes section 3004(*o*) requirements on interim status operators "with respect to each new unit, replacement of an existing unit, or lateral expansion of an existing unit that is within the waste management area identified in the permit application submitted under *this section*, and with respect to waste received beginning 6 months after November 8, 1984." 42 U.S.C. § 6936(b)(1) (Supp. III 1985) (emphasis added). Section 3015 (b)(2), 42 U.S.C. § 6936 (b)(2) (Supp. III 1985), in turn, requires the "filing ... of an application for a final determination regarding the issuance of a permit." Thus, section 3004(*o*) requirements appear to attach only to interim status facilities that apply for a final determination under section 3015(b). Since such applications for a final determination will be received after the date of enactment of the Hazardous and Solid Waste Amendments of 1984, those facilities, as well as all interim status facilities that receive waste beginning six months after the effective date of the 1984 Amendments will be required to comply with section 3004(*o*); others will not. We see no inconsistency between this and section 3004(*o*).

ly, we find that EEI's claim is not yet ripe for adjudication. If and when the Agency takes a position with regard to the applicability of section 264.101(a) to fossil fuel combustion wastes, EEI or some other proper party may institute an appropriate action.

IV. Conclusion

The various petitioners have raised a host of objections to the EPA's Final Rule. For the most part, we find these objections to be without merit. Certain other claims are not properly before us in this proceeding because they are not based on the Final Rule itself, but concern subsidiary matters on which the Agency has not yet acted or taken a position. We do find that 40 C.F.R. §§ 265.221, 265.301 are invalid to the extent that they impose section 3004(*o*) technological requirements on owners and operators whose applications for a final determination on their section 3005 permits were received before November 8, 1984.

So ordered.

CITIZENS ASSOCIATION FOR SOUND ENERGY, Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and United States of America, Respondents,

Texas Utilities Electric Co., et al., Intervenors.

No. 86-1169.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 5, 1986.

Decided June 26, 1987.

As Amended June 26, 1987.

Citizens group sought to stay effectiveness of Nuclear Regulatory Commission staff order amending construction permit by electric utility and to halt further construction at power station, upon utility's applying for extension of construction permit. The Nuclear Regulatory Commission denied requested relief, and citizens group petitioned for review. The Court of Appeals, McGowan, Senior Circuit Judge, held that: (1) citizens groups was only entitled to hearing to determine whether electric utility had shown good cause for extension, and (2) NRC was not required to initiate entirely new construction proceeding due to electric utility's allowing construction permit to expire before applying for extension.

Affirmed.

1. **Administrative Law and Procedure** ⇐470

Electricity ⇐8.5(2)

Citizens group was entitled only to administrative hearing to determine whether electric utility had shown good cause for extension of permit for construction of nuclear power plant upon utility's request for such extension; it was not entitled to present evidence at that hearing concerning quality of construction of plant, which would be more appropriate in proceedings to determine whether utility should be granted operating license. Atomic Energy Act of 1954, §§ 185, 189(a), as amended, 42 U.S.C.A. §§ 2235, 2239(a).

2. **Electricity** ⇐8.5(2)

Nuclear Regulatory Commission was not required to initiate entirely new construction proceeding as result of electric utility's failure to apply for extension of construction permit prior to permit's expiration, but rather could extend completion date by license amendment upon showing of good cause. Atomic Energy Act of 1954, § 185, as amended, 42 U.S.C.A. § 2235.

Petition for Review of an Order of the U.S. Nuclear Regulatory Commission.